BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CASEY M. SORELL Claimant	)	
VS.	)	
JEFFREY C. HAMBLETON, DDS Respondent	)	Docket No. 1,037,801
AND	)	
GENERAL INSURANCE CO. OF AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 16, 2008, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. James L. Wisler, of Lawrence, Kansas, appeared for claimant. Clifford K. Stubbs, of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that claimant had not provided respondent notice of her accident within ten days, nor was just cause shown for failure to give timely notice. Accordingly, the ALJ denied claimant's request for temporary total disability compensation and medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 15, 2008, Preliminary Hearing and the exhibits, and the transcript of the discovery deposition of claimant taken January 14, 2008, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the issue of whether she gave respondent notice within ten days of her accident.

Respondent requests the Board affirm the ALJ's finding that claimant did not give it notice of her alleged work-related injury within 10 days and that no just cause was given for her failure to give timely notice. Respondent further contends that claimant's injury did not arise out of and in the course of her employment.

The issues for the Board's review are:

(1) What is claimant's alleged date of accident?

(2) Did claimant provide respondent with timely notice of her accident?

(3) Did claimant's injuries arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant worked as a dental hygienist in the office of respondent on a part-time basis beginning in 2005. She stated that she spent 75 percent of her working day actually working on patients' teeth. When working on patients, she would be behind them in a bent-over position.

Claimant described September 6, 2007, as a typical work day; nothing unusual happened. However, the next morning when she awoke, she could hardly get out of bed because of pain directly in the back of her neck shooting down the left side of her upper back. She saw a chiropractor, Dr. Dennis Anthony, two times that day. When she felt no better by Monday, September 10, she called her family physician, Dr. Joan Brunfeldt. She was seen that day by Dr. Brunfeldt's nurse practitioner, who put her on medication and suggested that she stay off work that week. She called Dr. Brunfeldt's office again on September 12 because she was still in a lot of pain. Dr. Brunfeldt's office arranged to have an MRI performed. The MRI revealed a small to moderate protrusion at C5-6 with possible infringement on the left C6 nerve. Dr. Brunfeldt started claimant on physical therapy, and her first treatment was on September 19.

Claimant returned to work on September 18. She tried to work full days but could hardly lift her head because of excruciating pain and would work half a day and then go home. During a physical therapy session on September 28, her therapist told her that when she bends over, her spine comes together in the front and the disc protrudes in the back, causing the kind of shooting pain she was feeling. The therapist told her that being in that position over time was causing her more pain. Claimant understood from her therapist that her bent-over position at work was causing her pain. The next time she was scheduled to work, October 2, 2007, she spoke with respondent, Dr. Jeffrey Hambleton, and told him that her work was difficult for her because of her positioning. She had not told Dr. Hambleton that she attributed her neck problems to her work before that date.

Claimant knew before being told by the physical therapist that her work was aggravating her neck because she kept having to leave work. She said she waited as long as she did before telling Dr. Hambleton because she liked her job and did not want to "ruffle any waters."[1] At her discovery deposition, respondent's attorney asked:

> Q. So before you reported this to Dr. Hambleton, had you attributed the neck problems to your work?
>
> A. Oh, I definitely thought that it had something to do with work just because of the position I'm in at work but, you know, that first day I woke up, no, it wasn't my first–certainly wasn't my first assumption.[2]

Both Dr. Hambleton and his wife, who is also his office manager, testified that claimant did not tell them before October 2 that she was attributing her neck condition to her work. Dr. Hambleton stated that he knew claimant had previously fallen down some stairs at her home, and he attributed her neck problems to that fall.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2007 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the

[1] P.H. Trans. at 39.

[2] Discovery Depo. of Claimant at 26.

> condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-555c(a) states in part:

> There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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[3] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[4]

ANALYSIS

Claimant, in her brief to the Board, attempts to argue that her date of accident is December 5, 2007, because that is the "date upon which the employee gives written notice to the employer of the injury."[5] However, date of accident was not an issue at the preliminary hearing before the ALJ.

Claimant's written Claim for Compensation dated December 4, 2007, alleges a date of accident of September 6, 2007. Claimant's E-1 Application for Hearing, dated December 4, 2007, alleges a date of accident of September 6, 2007, but states the cause of accident was "[r]epetitive work as [a] dental hygienist." Claimant's December 4, 2007, seven-day demand letter to respondent alleges a date of accident of September 6, 2007. Claimant's E-3 Application for Preliminary Hearing alleges a date of accident of September 6, 2007. At the April 15, 2008, preliminary hearing, the ALJ announced: "This is an alleged 9-6-07 accident."[6] He then inquired: "Any additions, modifications, or corrections to that record before we get started?"[7] Counsel for claimant and respondent both answered: "No, Your Honor."[8]

Although claimant is now attempting to allege she suffered a series of repetitive traumas, she did not make that allegation at the preliminary hearing. Should claimant desire to amend her claim, she should make that request to the ALJ. The Board will not hear issues for the first time on appeal. Likewise, the Board will not address respondent's claim that claimant failed to prove her injury arose out of and in the course of her employment with respondent. The ALJ denied claimant's request for preliminary benefits based upon untimely notice. The ALJ did not address whether claimant suffered accidental injury arising out of and in the course of her employment with respondent and, therefore, neither will the Board in this appeal from the ALJ's preliminary hearing Order.

Claimant admits she did not give her employer notice that her injury was work related until October 2, 2007. If claimant had not made the connection between her injury and her work until September 28, 2007, when she had the conversation with the physical

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[4] K.S.A. 2007 Supp. 44-555c(k).

[5] K.S.A. 2007 Supp. 44-508(d)

[6] P.H. Trans. at 3.

[7] *Id.* at 4.

[8] *Id.*

therapist, then there could be just cause for not giving her employer notice within ten days of September 6, 2007, her alleged date of accident. However, claimant admits she had made this connection herself before September 28, 2007.

> MR. STUBBS: September 28 of 2007 was the physical therapy visit.
>
> A. [Claimant] So it would have been Tuesday after when I returned to work, yes.
>
> Q. (BY JUDGE AVERY) Okay. And did you know prior to that date that your positioning was somehow causing pain in your neck?
>
> A. Oh, I knew because I had to keep leaving work. So I knew that the positioning was not good for what was going on with me, yeah.
>
> Q. Is that the first time that you had told the doctor that you thought the positioning was causing some problems?
>
> A. I think verbally where I was specific, yes.
>
> Q. Was there a reason that you waited that long to tell him?
>
> A. I mean, I liked my job. I wanted to be at that job. I really didn't want to ruffle any waters, quite frankly. I mean, I still don't.[9]

CONCLUSION

Based on the record presented to date, claimant has failed to prove that she gave notice of her accident within ten days after September 6, 2007, and has failed to establish just cause for her failure to notify her employer.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated April 16, 2008, is affirmed.

IT IS SO ORDERED.

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[9] *Id.* at 39.

Dated this _____ day of June, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge